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**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 11-12

**HANJIN SHIPPING CO. LTD.; KAWASAKI KISEN KAISHA LTD.; NIPPON YUSEN
KAISHA; UNITED ARAB SHIPPING COMPANY (S.A.G.); and YANG MING MARINE
TRANSPORT CORPORATION,**

COMPLAINANTS

v.

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
RESPONDENT**

**STATEMENT OF FACTS NOT IN DISPUTE
FOR FINAL JUDGMENT ON THE RECORD
AS IT STANDS**

Introduction

Complainants Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; United Arab Shipping Company (S.A.G.); and Yang Ming Marine Transport Corporation submit this Statement of Facts Not in Dispute in support of a Motion for Final Judgment requesting a decision on the two issues remaining in Complainant's Amended Complaint.

On February 15, 2013 Complainants filed, in sur-reply, "Complainants' Reply to Port Authority's Response to Complainants' Statement of Facts Not In Dispute and Port Authority's Statement of Additional Facts," in connection with Complainants' prior Motion for Judgment. That document contained a total of one hundred and sixty-eight Facts, ninety-one Facts set out

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by Complainants and seventy-seven Additional Material Facts set out by Respondent Port. Following each of Complainants' Facts was the Port's Response, declaring the Port's dispute or lack of dispute or some combination thereof as to each of Complainants' ninety-one Facts. In their sur-reply. Complainants replied to each Port Response where the Port claimed there was any dispute of Complainants' Facts. Sequentially, thereafter, were the Port's seventy-seven Additional Material Facts and the Complainants Responses thereto.

This case should be decided now on the limited fact allegations made by Complainants and relied on in their Motion for Final Judgment, which are supported in the main by Complainants' original statements of undisputed fact, but may in some instances be buttressed by the additional information conveyed in the Port's responses which are accepted by Complainants. In such instances, Complainants do not hesitate to benefit from the Port's additional material. Accordingly, there follows Complainants' Revised Statement of Facts, drawing from the filing of February 15, 2013. Herein, Complainants do not modify their fact statements or the Port's statements as drawn from the statement of February 15, 2013. Complainants' paring down of the relevant facts and acceptance as accurate for purposes of this case all the Port's responsive non-legal statements is concise and conciliatory. Complainants own statements below are important and relevant (to the contemporaneous amended complaint) fact statements from the February 15, 2013 filing. Complainants include the Port's Response to each numbered Fact, and Complainants are now accepting as accurate (but not in every instance as relevant), for the purpose of the motion for final judgment filed herewith, everything factual and substantive that the Port said in these responses to Complainants' fact statements.

Whatever is contained in the Port's Response, except for the Port's characterization of its response as disputing Complainants' fact statement (or legal argument), Complainants embrace

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as accurate for the purpose of this docket, to move this case to final decision. Complainants' final, factual case, however, is supported by Complainants' own statements of fact drawn from the statement filed February 15, except as the further statements made by the Port and accepted by Complainants may be relevant in some instances.

Filed this day is Complainants' Motion for Final Judgment on the Record As It Stands. This motion fully articulates Complainants' position and Complainants' final negation of any fact dispute. With Complainants now accepting as accurate all the factual assertions in these Port Responses, relevant or not, the Complainants' statements essentially form the foundation of indisputable facts upon which a decision may be issued, and are relied on in the Motion for Final Judgment on the Record.

The Indisputable Facts

The material below includes the Port's verbatim Responses to numerically numbered facts as Complainants set out in their February 15, 2013 sur-reply. After each Fact originally proffered by Complainant is the Port's Response (verbatim). The Port's Response in each case is accepted as accurate unless it is a mere characterization or a legal argument. The Complainants retained the numbers that correspond to the Facts set forth in their February 15, 2013 filing. Complainants' elimination of many fact statements reduced the number of Facts, hence the gaps in the numbering that appear below. Following each of the Port's Responses is the new, accepting reply by Complainants.

1. Each of the Complainants is an ocean common carrier within the meaning of the Shipping Act, 46 U.S.C. §§ 40102(6) and (17). At all times material to this complaint, each Complainant has operated vessels as an ocean common carrier in the United States foreign commerce subject to the Shipping Act.

[PORT] RESPONSE: ~~Disputed to the extent Complainants suggest that their business is limited to using and operating vessels to transport cargo containers and non-containerized~~

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~~cargo across the ocean~~. Complainants are highly integrated global shipping and logistics companies that coordinate the transportation of cargo containers and/or non-containerized cargo from its point of origin, across the ocean, through port infrastructure, and inland to its ultimate destination. See Declaration of Brian Kobza, dated February 1, 2013 (“Kobza Decl.”), ¶ 8; see also Declaration of Reed Collins, dated February 1, 2013 (“Collins Decl.”), ¶¶ 3, 4 & Ex. B (printouts from websites of Hanjin Shipping Co. (“Hanjin”), Kawasaki Kisen Kaisha, Ltd. (“K’ Line”), and Nippon Yusen Kaisha’s (“NYK”)), Ex. C (printouts from website of Yang Ming Marine Transport Corp. (“Yang Ming”)); Opposition to Motion to Compel, dated January 10, 2013 (“Opp. to MTC”), at 4-6. One aspect of Complainants’ business enterprises is the operation of vessels as ocean common carriers within the meaning of the Shipping Act, 46 U.S.C. § 40102(6) and (17). See Opp. to MTC at 4.

Complainants concede that their role in the movement of cargo is not limited to the operation of the vessel. See, e.g., Opp. to MTC at 4 (admitting that “Complainants, while fundamentally vessel operators who load, carry and discharge containers, do subcontract the movement of cargo under through bills of lading to and from inland points”). Complainants also provide “through transportation” of cargo containers (or non-containerized cargo). See Kobza Decl. ¶12; Opp. to MTC at 4 (“Complainants provide port to port transportation under ‘berth terms’ as well as intermodal through transportation of containerized cargo”) (emphasis added). “Through transportation” is defined by the Shipping Act as a combination of ocean and inland transportation. See 46 U.S.C. § 40102(25) (defining “through transportation”). When “through transportation” is provided, the vessel-operating carrier remains responsible for coordinating the movement of the cargo container (or non-containerized cargo) until it reaches its final destination by ground transport. See Kobza Decl. ¶12. The ocean common carrier typically charges the

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beneficial cargo owner (“BCO”) or non-vessel operating common carrier (“NVOCC”) that arranges the shipment a single rate plus any surcharges that covers both ocean and inland transportation. See 46 U.S.C. § 40102(25) (noting that a “through rate” must be charged for “through transportation”); 46 U.S.C. § 40102(24) (defining “through rate” as a “single amount charged by a common carrier in connection with through transportation”); see also Kobza Decl. ¶ 13, Exs. A-K (copies of examples of Complainants’ publicly available through bills of lading). Ocean common carriers also contract with railroads and/or trucking companies to provide inland transportation of cargo containers. See Kobza Decl. ¶ 14; Opp. to MTC at 4-5 (conceding that Complainants “subcontract the movement of cargo under through bills of lading to and from inland points” and have been providing such intermodal through transportation services “for about fifty years”); Collins Decl. ¶ 3 & Ex. B (printouts from Hanjin’s website) (noting that Hanjin provides inland transportation/distribution services by truck and railway), Ex. B (printouts from “K” Line’s website) (“K” Line “provide[s] total logistics services meeting the growing diversity and complexity of logistics needs -including . . . truck transportation”) (emphasis added). The exact extent to which the Complainants’ business involves inland movement of cargo containers and/or non-containerized cargo would be set forth in the Complainants’ contracts with BCOs. Kobza Decl. ¶ 15. Complainants have thus far refused to produce these contracts. See Rule 56(d) Declaration of Jared Friedman, dated February 1, 2013, ¶ 23.

COMPLAINANTS’ ACCEPTANCE OF PORT’S RESPONSE: Complainants accept as accurate, although irrelevant, the Port’s Response except for the struck-through words characterizing the fact statement as “disputed” .

2. Respondent is a marine terminal operator within the meaning of 46 U.S.C. § 40102(14), FMC Organization No. 002021.

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[PORT] RESPONSE: No dispute. The Port Authority is a body corporate created by compact as a bi-state port district between the states of New York and New Jersey with consent of Congress. See Declaration of Peter Zantal, dated February 1, 2013 (“Zantal Decl.”), ¶5; see also (Corrected Answer, filed September 7, 2011 (“Answer”)) at p. 3; Complaint, filed August 5, 2011 (“Compl.”) at p. 3.

3. Respondent leases most of its marine terminal facilities to private terminal operators who operate container terminals located at the Port and who provide marine terminal services and facilities to ocean common carrier vessels calling at the Port.

[PORT] RESPONSE: ~~Disputed to the extent that Complainants’ statement purports to summarize accurately the contents of the “about-port.html” page of the Port Authority’s website, which Complainants cite and summarize in vague terms. What the Port Authority’s website actually states is that the Port Authority “leases most of its terminal space to private terminal operators, which manage the daily loading and unloading of container ships.” Complainants’ Ex. 6 (<http://www.panynj.gov/port/about-port.html>) (emphasis added).~~¹

~~Further disputed to the extent Complainants imply that the Port Authority does not provide services and/or benefits in, about, and at the leased terminals. The Port Authority provides and maintains facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. See, e.g., Zantal Decl. ¶¶110, 34, 41 & Ex. 8 (The Port Authority’s Guide, revised Sept. 17, 2009) (describing some of the infrastructure, intermodal transportation, and security projects~~

¹ Citations to “Complainants’ Ex.” refer to Complainants’ exhibits to their statement of facts, unless a different source or declaration is specified.

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provided by the Port Authority) (PA-CFC-00000239-255). Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See Complainants' Motion for Judgment, filed December 6, 2012 ("Mot. for J.") at 13; see also Opp. to MTC at 2.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept as accurate, but irrelevant, the Port's Response except for the claim (struck-through above) that a "dispute" exists.

4. The Port furnishes none of the services provided to Complainants at those leased terminals.

[PORT] RESPONSE: ~~Disputed.~~ Private marine terminal operators ("MTOs") provide certain services to Complainants, primarily stevedoring and daily loading and unloading of container ships. See, e.g., Complainants' Ex. 6 (<http://www.panynj.gov/port/about-port.html>); see also Complainants' Ex. 7 (Stevedoring and Terminal Services Agreement between COSCO Container Services, LLC ("Global Terminal"), New York Container Terminal, Inc. ("NYCT"), and Port Newark Container Terminal ("PNCT")).

The Port Authority provides different services and/or benefits to Complainants, which are separate and distinct from the services performed by private MTOs. Zantal Decl. ¶41. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See *supra* ¶3.

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COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept as accurate, but irrelevant, the Port's Response except for the stricken word "Disputed."

5. The Port also maintains and operates public berths. Roll-on/roll-off vessels that transport vehicles transiting the Port dock at the Port's public berths, where private stevedores furnish loading/discharging services.

[PORT] RESPONSE: ~~Disputed to the extent Complainants imply that the Port Authority does not provide services and/or benefits in, about, and at the Port Authority's public berths.~~ Most of the non-containerized cargo (including vehicles, bulk, and break-bulk cargo) coming into and out of the port use terminal space at public berths that has not been leased to private marine terminal operators ("MTOs"). Zantal Decl. ¶7; see also Complainants' Ex. 6 (<http://www.panynj.gov/port/about-port.html>). The Port Authority provides services and/or benefits in, about, and at its public berths, which are separate and distinct from the services and benefits provided by private stevedores. Zantal Decl. ¶41. The Port Authority provides and maintains facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶3-4.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants adopt the Port's Response as accurate, but irrelevant, excepting the deleted words characterizing the statement as "disputed".

6.

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[PORT] RESPONSE: No dispute.

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7. All terminal services (as defined by 46 CFR § 525.1) furnished to Complainants' container vessels within the Port limits are provided by private marine terminal operators at their leased facilities.

[PORT] RESPONSE: ~~Disputed to the extent Complainants imply that the Port Authority does not provide services and/or benefits in, about, and at the leased facilities.~~ Private MTOs furnish the services enumerated in 46 CFR § 525.1 to Complainants' vessels; however, 46 CFR § 525.1 does not purport to contain an exhaustive listing of terminal services. See 46 CFR § 525.1. The Port Authority provides services and benefits which are separate and distinct from the services provided by private MTOs. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶3-5.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: **Complainants accept the Port's Response as accurate, but irrelevant, excepting the deleted words characterizing the statement as "disputed" .**

8. No services are provided to Complainants' container vessels by the Port Authority. There is no privity or other contractual or commercial relationship between Complainants and Respondents relating to their container vessel services.

[PORT] RESPONSE: ~~Disputed.~~ The Port Authority provides services and benefits in, about, and at leased and public terminals, including the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. These services and benefits are

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separate and distinct from the services provided by private MTOs and stevedores. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶ 3-5, 7.

Complainants are deemed to be in privity with the Port Authority through implied contracts by virtue of their use of and benefit from the facilities, infrastructure, roadways and intermodal transportation, as well as security services and projects provided by the Port Authority. 46 CFR §525.2(a)(2) ("Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving services rendered by the marine terminal operator...") (emphasis added).

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response as accurate, but irrelevant, excepting the deleted words characterizing the statement as "disputed," and the legal argument in the second paragraph.

10. In addition to container vessels, Complainants "K" Line and NYK Line also operate non-container vessels, i.e., roll-on/roll-off ("ro/ro") vessels for the carriage of vehicles and other wheeled cargo.

[PORT] RESPONSE: No dispute.

11. Such ro-ro vessels call at Respondent's public berths.

[PORT] RESPONSE: No dispute.

12. At public berths where Complainants' non-container vessels berth, stevedoring is provided by private stevedoring companies; Complainants' vessels do not use services furnished by, or participated in, by the Port in connection with loading, handling or discharging containers and/or non-containerized cargo.

[PORT] RESPONSE: ~~Disputed to the extent Complainants are asserting that the Port Authority does not provide Complainants with services and/or benefits. Private stevedoring~~

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companies provide loading and unloading services to Complainants at public berths. The Port Authority provides services and benefits which are separate and distinct from the services provided by private stevedoring companies. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation network, as well as security that allow carriers that call at either leased or public terminals at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶ 3-5, 7-9.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response as accurate, but irrelevant, excepting the deleted words characterizing the statement as "disputed" .

13. The Port publishes a Tariff covering all of its public berths. It is published at <http://www.panynj.gov/port/tariffs/html>.

[PORT] RESPONSE: ~~Disputed to the extent Complainants are suggesting the Tariff is only applicable at public berths.~~ The Tariff is applicable at both private and public berths. See Complainants' Ex. 10 (Tariff) at Subrule 34-1200 (providing that "Mins fee shall apply . . . at Port Authority leased and public berths") (emphasis added).

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept as accurate the Port's Response.

14. The marine terminal operators who lease and operate the containerized terminals at the Port are: New York Container Terminal, APM Terminals, Maher Terminals, Port Newark Container Terminal, Global Marine Terminal and American Stevedoring Inc.

[PORT] RESPONSE: ~~No material dispute, except that American Stevedoring Inc. no longer operates a terminal at the port.~~ The Port Authority also has an operating agreement with Red Hook Container Terminal LLC ("RHCT") through March 2013. Zantal Decl. ¶8.

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COMPLAINANTS' ADOPTION OF PORT'S RESPONSE: Complainants accept the Port's Response as accurate.

16. Maher Terminal Marine Terminal Schedule No. 010599 is published at <http://www.maherterminals.com/index.cfm/do/page.tariff/>.

[PORT] RESPONSE: No dispute.

Terminal Tariff Provisions Regarding the CFC

18. Section H of the Tariff, effective March 14, 2011, set forth a Cargo Facility Charge ("CFC") and complete subrules for imposing and enforcing the CFC.

[PORT] RESPONSE: No dispute.

19. Subrule 34-1200 of Section H of the Port's Tariff defines the CFC, effective March 14, 2011, to apply to "all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths."

[PORT] RESPONSE: No dispute.

20. The Tariff imposes a CFC of \$4.95 per TEU of "Container Cargo," and "any containers larger than forty-feet shall be considered to be the equivalent of two TEUs."

[PORT] RESPONSE: ~~Disputed to the extent that Complainants' statement offers a legal interpretation of the Tariff.~~ The Tariff imposes a charge of \$4.95 per TEU on cargo containers. See Complainants' Ex. 10 (Tariff) at Subrule 34-1210.

COMPLAINANTS' ACCEPTANCE OF THE PORT'S RESPONSE:
Complainants accept the Port's Response except insofar as the deleted language characterizes the statement as factually inaccurate.

21. For Vehicles, the rate is \$1.11 per unit/vehicle; for bulk cargo, break-bulk cargo, general cargo, heavy-lift cargo and other special cargo, it is \$0.13 per metric ton.

[PORT] RESPONSE: No dispute.

24. The Tariff provides for the CFC to be assessed against a so-called terminal "user," defined as "a user of cargo handling services."

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[PORT] RESPONSE: No dispute. The Tariff requires “users” to pay the CFC. See, e.g., Complainants’ Ex. 10 (Tariff) at Subrules 34-1220(2) and 34-1220(3). The Tariff defines “user” to mean “a user of cargo handling services.” Id. at Subrule 34-1220(1)(a).

25. The Tariff nowhere defines the term “cargo handling services.”

[PORT] RESPONSE: No dispute. The term, “Cargo handling services,” is commonly understood in the maritime shipping industry to mean services related to the loading or unloading of cargo containers and/or non-containerized cargo. Kobza Decl. ¶5.

26. For the purposes of the CFC, the Port applies “user” to mean any vessel calling at any terminal, including leased terminals, at the Port.

[PORT] RESPONSE: ~~Disputed.~~ The Port Authority does not apply “user” to mean any vessel calling at any terminal, including leased terminals. The Port Authority applies “user” as defined by the express language of the Tariff. See Complainants’ Ex. 10 (Tariff) at Subrule 34-1220(1)(a) (defining “user” to mean “a user of cargo handling services”). At the Port Authority’s private marine terminals, the only users of cargo handling services are the ocean common carriers whose cargo containers and non-containerized cargo are unloaded from or loaded onto vessels, through contract agreements with the private terminal operators. Kobza Decl. ¶6. At the Port Authority’s public berths, nearly all of the users of cargo handling services are also the ocean common carriers. Id. Therefore, for purposes of the CFC, the terms “user” and “carrier” are interchangeable with respect to Complainants’ cargo container operations. See generally Complainants’ Ex. 10 (Tariff); see also Complainants’ SOF 9146 (Complainants concede that they have “been, and continue[] to be, invoiced for the CFC for containers listed in its bills of lading whether carried on its own vessels or on other carriers’ vessels under space charters at all Port terminal facilities”).

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The CFC is assessed at the time that the cargo container or non-containerized cargo is loaded onto or unloaded from a vessel at the port. With respect to cargo containers, the CFC is invoiced to the carrier that is responsible for the cargo container irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. Zantal Decl. ¶36.

The carrier that is responsible for the particular cargo container is the carrier that has contracted and issued a bill of lading for the carriage of the cargo container, not the carrier that happens to own or operate the vessel transporting the cargo container. Id. Each carrier is individually billed for the CFC, regardless of whether the carrier's cargo containers are carried on a vessel it owns and operates or are being transported on another carrier's vessel under a vessel sharing agreement, slot charter or other arrangement. Zantal Decl. ¶37. By placing the obligation to pay the CFC on the carrier that has taken contractual responsibility for the carriage of the goods, the CFC is assessed on the party most directly responsible for the movement of the cargo container from its point of origin, through the port, and onward to its final destination. Id.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response as accurate, excepting the language stricken by Complainants which characterizes the statement as factually "disputed" .

27. "Terminal operator" is defined in the Tariff to be a "leased berth operator."

[PORT] RESPONSE: No dispute.

28. As a result, under the Tariff as drafted, a vessel must pay the CFC to Respondent if it is a "user of cargo handling services," even if such services are provided by a party other than Respondent, i.e., a "terminal operator" (leased berth operator). Put another way, Respondent charges vessels for obtaining "cargo handling services," even though no such services are provided by Respondent.

[PORT] RESPONSE: ~~Disputed.~~ The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which the container is transported, whether that particular carrier's own vessel or another vessel provides the ocean transport. See Complainants'

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Ex. 10 (Tariff) at Subrules 34-1220(2) and 34-1220(3); Zantal Decl. ¶36. Further, the Port Authority does not charge the CFC as a fee for obtaining “cargo handling services” from private MTOs or stevedores. The CFC is a charge to recoup and finance the Port Authority’s capital investment in the facilities, infrastructure, roadways, and intermodal transportation network projects and services, as well as the provision of security that allow carriers that use either leased or public terminal space at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently through the port after the cargo containers and/or non-containerized cargo have been unloaded from the vessels en route to their final in-land destination (or for outbound cargo containers and/or non-containerized cargo, before they are loaded onto the berthed vessels). Zantal Decl. ¶¶10, 14, 34 & Ex. 10 (“Implementation of a Land-Side Access Infrastructure and Security Fee,” dated Aug. 2, 2010) (explaining that the CFC is “[d]esigned to recoup costs of ExpressRail Development program[,] . . . recoup previous non-amortized and all incremental post 9/11 costs of port related security capital and o&m costs[,] . . . [and] expand capital capacity to allow [planned roadway projects] to progress”) (PA-CFC00035866-877) at 868, Ex. 19 (Port Authority’s Board Meeting Minutes, dated December 7, 2010) (detailing three components of the CFC) (PA-CFC00042158-160) at 158, Ex. 15 (Port Authority Memorandum, dated February 1, 2011) (PA-CFC-00020998-005) at 998-999 (same), Ex. 7 (undated Port Authority Presentation entitled “Cargo Facility Charge”) (PA-CFC00019082-090) at 084, 086089 (same), Ex. 20 (Port Authority Memorandum regarding “Maersk,” dated February 1, 2011) (noting that the Port Authority “has made considerable investments to port infrastructure” and that further enhancements are necessary, which all need to be recouped) (PA-CFC00048773- 786) at 781, Ex. 21 (“Chart: Revised CFC Fee- Rate Breakdown,” dated June 13, 2011) (PACFC00020902-908); see also Complainants’ Ex. 20

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(“Port Commerce Department User Fees,” dated Jan. 2, 2008) (PA-CFC00020412-417) at 414; Complainants’ Ex. 27 (Port Authority Internal Memo, dated Oct. 16, 2010) (noting that the CFC “would be assessed on those cargos that benefit from certain capital investments and attendant operations and maintenance costs,” including, “non-reimbursable incremental post-9/11 expenses needed to meet federally mandated and other security measures” and “continued investment in [the Port Authority’s] intermodal ExpressRail system and . . . essential roadway projects in Port Newark/Elizabeth that will provide needed roadway capacity to further reduce Port congestion”) (PA-CFC-00040541-543) at 541.

COMPLAINANTS’ ACCEPTANCE OF PORT’S RESPONSE: Complainants accept the Port’s stated Response excepting the deleted word which characterizes this semantic quibbling as a factual dispute and fails to recognize that a container is legally a part of the vessel listed in the bill of lading, not the vessel on which it is carried under space charter.

29. Whether using the services of leased terminals or berthing at public terminals, all vessels are held responsible by the Tariff for payment of the CFC, which charge is triggered by the handling by private entities of all containers and non-containerized cargoes on all carriers’ vessels, including containers operated by vessel space charterers.

[PORT] RESPONSE: ~~Disputed.~~ The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which the container is transported, whether that particular carrier’s own vessel or another vessel provides the ocean transport. See supra ¶¶26, 28. The CFC is a charge to recoup and finance the Port Authority’s capital investment in the facilities, infrastructure, roadways, and intermodal transportation network projects and services, as well as the provision of security that allow carriers that use either leased or public terminal space at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. See supra ¶28. Consistent with this purpose, the CFC is triggered by the loading or unloading of cargo containers or non-containerized cargo that are will or have transited the port. See Zantal Decl. ¶49; Complainants’ Ex. 10 (Tariff) at Subrule 34-1220(3)(a)(ii).

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COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response excepting the deleted word "disputed", which characterizes these two statements as creating a factual dispute.

30. The Port scheme is facially that the lessee terminal operator is required by the Tariff to collect the CFC from each container vessel operator and to forward the payments to the Port.

[PORT] RESPONSE: ~~Disputed.~~ Lessee MTOs do not collect the CFC from each container vessel operator. See Zantal Decl. ¶¶48-50 & Ex. 22 (Port Authority Memorandum, dated May 4, 2011) (describing the process by which the PA gathers the data used to determine the amount of the CFC incurred by each carrier) (PA-CFC00020511-515) at 511; see also Complainants' Ex. 10 (Tariff) at Subrule 34-1220(3)(a)(ii); Complainants' SOFT 46 (conceding that the carrier - and not the vessel - is individually billed for each container the carrier transports). The MTO is required to collect the CFC from each ocean common carrier incurring the charge and to forward the payments to the Port Authority. See Complainants' Ex. 10 (Tariff) at Subrule 341220(2) (providing that "[a]t all leased berths, each user is responsible for payment of the Cargo Facility Charge to the Port Authority, which will be collected by the terminal operator handling the user's cargo for remittance to the Port Authority") (emphasis added).

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response as accurate except for the deleted word "Disputed," by which the Port erroneously tries to convey that there is a material factual dispute, when there is not.

32. Terminal operators must send a monthly Vessel Activity Report ("Report") to the Port Authority detailing all vessel activity at their terminals. The Report must identify vessels from which the terminal operator did not receive the CFC charges stated in the Port Authority invoices submitted to the terminal operator.

[PORT] RESPONSE: ~~Disputed.~~ The CFC is invoiced to the carrier that is responsible for the cargo container irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. See supra ¶26. The required Reports pertain to users, not

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vessels. See Complainants' Ex. 10 (Tariff) at Subrule 34-1220(3)(b)(ii) (explaining that MTOs must send a monthly Vessel Activity Report to the Port Authority detailing each user's loading and unloading activities at their terminals and the MTO must also identify users that did not pay their CFC charges stated in the invoices submitted to the MTO).

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's above stated Response excepting deleted word "Disputed," by which the Port erroneously tries to convey there is a material factual dispute, when there is only a semantic difference due to the Port not recognizing that containers are legally part of the vessel under whose bill of lading they are moved.

33. For their vessels' use of a public (non-leased) berth, the Tariff directs Complainants to pay the CFC directly to the Port.

[PORT] RESPONSE: ~~Disputed.~~ Complainants' statement that the CFC compensates the Port Authority for a vessel's use of a public berth is false. The CFC is a charge to recoup and finance the Port Authority's capital investment in the facilities, infrastructure, roadways, and intermodal transportation network projects and services, as well as the provision of security that allow carriers that use either leased or public terminal space at the port to move cargo containers and non-containerized cargo more quickly, safely, and efficiently. See supra ¶¶28-29. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects and services. See supra ¶¶3-5, 7-9.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response excepting the deleted word "Disputed" which erroneously derives from another semantic quibble. Complainant's statement does not go into the use of the CFC proceeds, only describes the applicability of the CFC to public berths. A vessel uses a public berth, it pays the Port.

34. The Port issues monthly invoices to each "user" of a leased terminal and to each "user" of a public berth.

[PORT] RESPONSE: No dispute.

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35. Invoices to “users” of leased terminals are issued “do” the terminal based on the prior month’s terminal Report.

[PORT] RESPONSE: No dispute.

37. If a “user” does not pay the CFC charges for two consecutive Report periods, Section H directs the Port to require all terminal operators to cease service to all vessels whose operator did not pay the CFC charge and provides that the Port will issue a port-wide blockade order:

...the Port Authority shall issue a directive to every terminal operator prohibiting them from providing any service that would be subject to a Cargo Facility Charge to the delinquent user for a period from no later than 5 calendar days from the date of the directive until receipt of notice from the Port Authority that such unpaid Cargo Facility Charges have been paid.

[PORT] RESPONSE: ~~Disputed to the extent that Complainants’ statement offers a legal interpretation of the Tariff, Section H, and also because Complainants have improperly substituted “vessel” for “user” in describing the Tariff. See generally Complainants’ Ex. 10~~ (Tariff) at Section H (distinguishing between “users” and “vessels”). See supra ¶¶28-29. The CFC is invoiced to the carrier that is responsible for the cargo container, not the vessel on which the container is transported, whether that particular carrier’s own vessel or another vessel provides the ocean transport. See supra ¶¶26, 28.

If a carrier does not pay the invoiced CFC charges for two consecutive reporting periods (a “non-compliant carrier”), the Port Authority’s practice is to contact both the non-compliant carrier and each private terminal operator to remind them of the outstanding balance. If the balance remains unpaid, the Tariff authorizes the Port Authority to issue a directive requiring all terminal operators either to cease service to the non-compliant carrier or to take financial responsibility itself for payment of that carrier’s CFC charges. See Complainants’ Ex. 10 (Tariff) at Subrule 34-1220, 3(b)(iii)-(iv). Thus, a non-compliant carrier’s cargo containers may still be moved through the port where a terminal operator accepts financial responsibility for paying the CFC on the non-compliant carrier’s behalf. Zantal Decl. ¶38.

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Additionally, only a non-compliant carrier, but not a vessel, risks being unable to move its cargo containers through the port by failing to pay the CFC. Zantal Decl. 39. For example, a vessel owned by a non-compliant carrier is permitted in the port to load and unload the containers of any compliant carrier that are being transported on the vessel. Id. Likewise, a vessel owned by a compliant carrier that is that is transporting of both compliant and noncompliant carriers is also permitted in the port and can discharge and load the containers of any compliant carrier. Id. But in any of these circumstances, the vessel itself is allowed to berth at the port. Id.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE:Complainants accept the Port's Response excepting the deleted words which attempt to set up an artificial factual dispute. The "ocean carrier" vessel operators can only use the Port by the instrumentality of a vessel, so blockade of a carrier is blockade of its vessels. This whole dispute concerns an operational situation, not a regulatory one, so the vessels which operate in the Port are the target of the CFC, regardless of the signature on the check or wire order paying the CFC. The vessel operators are a "vessel," not a "cargo" interest, but Complainants' bow to the Port's semantic preference.

39. A directive by the Port to deny service to a delinquent carrier effectively blockades not only that operator's vessels and appurtenant containers, but, as well, all the containers to be carried on the delinquent operator's vessels under space charters, and all the delinquent operator's containers in slots chartered on other operator's vessels.

[PORT] RESPONSE: ~~Disputed.~~ Complainants' statement offers an incorrect legal interpretation of the Tariff and is inconsistent with the language, application, and enforcement of the Tariff. See supra ¶37. Only a non-compliant carrier, but not a vessel, risks being unable to move its cargo containers through the port by failing to pay the CFC. See id. A directive by the Port Authority to prohibit a non-compliant carrier from loading or unloading its cargo containers at the port does not "blockade" or "bar" that carrier's vessel from berthing at the port to load and unload the cargo containers of any compliant carriers that are being transported on the vessel. See id. Likewise, a vessel owned by a compliant carrier that is carrying cargo containers of a non-compliant carrier and compliant carriers is also permitted in the port and, can discharge and

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load the containers of any compliant carriers. See *id.* Furthermore, even a non-compliant carrier can load or unload its cargo containers so long as the MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See *id.*

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response excepting the deleted word "Disputed." The Port's statement is utterly unrealistic in the real world of vessel operations, in view of the disastrous impact of the bar on the non-paying operator's service, and the idea that a non-paying operator would call the Port only to handle space charter containers laughable, but the statement is irrelevant to any argument made in the accompanying Motion for Judgment.

42. The threat of berth denial forces Complainants to pay the CFC on both roll-on/roll-out vessel operations and on container vessels/container operations, including those of space charterers.

[PORT] RESPONSE: ~~Disputed.~~ A vessel owned by (or carrying cargo containers for) a non-compliant carrier is still permitted to berth in the port. The cargo containers of all carriers that have paid the CFC may still be loaded and unloaded at the port even if transported on a vessel of a non-compliant user. Only the non-compliant carrier's cargo containers (whether carried on a vessel owned by the non-compliant carrier or another carrier's vessel) may not be loaded or unloaded at the port, unless, of course, the MTO handling the non-compliant user's cargo containers agrees to pay the non-compliant user's CFC-charges. See *supra* ¶¶37, 39-42.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response as accurate except for the word "Disputed" which is in stricken because it is inapplicable in view of Complainants' acceptance. Despite the utter unrealism of the scenario where a vessel operator accepts the destruction of its service and calls as taxi service for space charterers, this picture, which is not really a "fact," is unnecessary to Complainants' arguments in their Motion.

44. Each of the Complainant's vessels regularly call at a lessee's terminal and each Complainant has loaded and discharged, and continues to load and discharge, cargo at the respective terminal.

[PORT] RESPONSE: No dispute.

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45. According to the process described by the Tariff, since March 14, 2011, each Complainant has been, and continues to be, invoiced by the Port do the container terminal operator for the CFC.

[PORT] RESPONSE: No dispute.

47. Each Complainant is forced by the blockade threat to then pay the CFC to the Port via the leased terminal.

[PORT] RESPONSE: ~~Disputed.~~ The CFC is not enforced by threat of any blockade. A directive by the Port Authority to prohibit a non-compliant carrier from loading or unloading its cargo containers at the port does not “blockade” or “bar” that carrier’s container vessel from berthing at the port. Nor does such a directive bar from the port other vessels that are carrying cargo containers for the non-compliant carrier. The cargo containers of all carriers that have paid the CFC can still be loaded and unloaded at the port even if transported on a vessel of a noncompliant user. Furthermore, even a non-compliant carrier can load or unload its cargo containers so long as the MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See supra ¶¶37, 39-42.

COMPLAINANTS’ ACCEPTANCE OF PORT’S RESPONSE: Complainants accept the Port’s Response as accurate excepting the deleted word “Disputed,” since it is not disputed. It is ridiculous, but not any part of Complainants’ case at this point.

48. The Port would deny, and the Port has threatened to deny, any Complainant’s vessels access to berths at the Port, leased and public, where that Complainant has not paid the CFC according to the Port’s demands. The Port announced enforcement for lack of compliance with the CFC and its supporting rules in Section H, beginning August 15, 2011.

[PORT] RESPONSE: ~~Disputed as to the first sentence of Complainants’ SOF ¶48.~~ The Port Authority does not deny, and has not threatened to deny, any Complainants’ vessels access to leased berths at the port, irrespective of whether that Complainant has or has not paid the CFC.

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A directive by the Port Authority to prohibit a non-compliant carrier from loading or unloading its cargo containers at the port does not “blockade” or “bar” that carrier’s container vessel from berthing at the leased terminals. Nor does such a directive bar from the port other vessels that are carrying cargo containers for the non-compliant carrier. The cargo containers of all carriers that have paid the CFC can still be loaded and unloaded at the port’s leased and public berths even if transported on a vessel of a non-compliant carrier. Furthermore, even a non-compliant carrier can load or unload its cargo so long as the private MTO accepts responsibility for paying the CFC fees incurred by the non-compliant carrier. See supra ¶¶37, 39-42, 47. No dispute as to the second sentence.

COMPLAINANTS’ ACCEPTANCE OF THE PORT’S UTTERLY UNREALISTIC RESPONSE REGARDING CONTAINER SHIPS: Complainants accept the Port’s unrealistic Response regarding container vessels, which does not bear on any argument made by Complainants, except the deleted words. Complainants will not dispute the Port’s imaginary scenario where container ships call the Port only to carry on space charterers’ services. As to non-container ships at public berths , the Port does not dispute that it will bar those vessels, so that part of the statement stands undisputed.

49. On July 12, 2011, Brian Kobza, Industry Relations - Ocean Carrier, Auto, Rail and Labor at the Port Authority of New York and New Jersey, sent an e-mail to 57 ocean carrier representatives, including Complainants, transmitting a copy of an undated notice from Dennis Lombardi, Deputy Director, Port Commerce Department, to each Leased Berth Terminal Owner.

[PORT] RESPONSE: No dispute.

50. The notice from Mr. Lombardi, transmitted to the carriers by Mr. Kobza, stated that the first enforcement action for uncollected Cargo Facility Charge amounts will be taken on August 15, 2011.

RESPONSE: No dispute.

51. The notice further stated:

Within 30 days after the date of each invoice, the lease berth operator must remit the amount collected from each user and/or make a report of each user who failed to pay the Cargo Facility Charge during the relevant Vessel Activity Reporting period. In the event of a failure by a user to pay Cargo Facility Charges for two consecutive Vessel Activity Reporting periods, the Port Authority will issue a directive to all leased berth operators prohibiting them from providing any service

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that incurs a Cargo Facility Charge to the delinquent user. Should a Terminal Operator provide service to a user in violation of the directive, such Terminal Operator shall be liable for, and shall pay to, the Port Authority the full amount of the Cargo Facility Charges resulting from services performed by that Terminal Operator for the affected user on or after the date of the violation of the directive.

[PORT] RESPONSE: No dispute.

55. The lessee MTOs that serve Complainants' container vessels assess charges in accordance with their published tariffs, or in accordance with rates specified in individual contracts with Complainants. The Complainants' vessels pay fees and charges to the lessee MTOs for actual services performed at their leased container facilities, pursuant to their tariffs or Complainants' contracts with them.

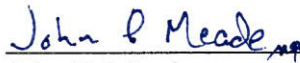
[PORT] RESPONSE: ~~Disputed to the extent Complainants are implying that the only services and/or benefits they receive in, about, and at the leased marine terminals are those provided by private MTOs. Private MTOs charge for loading, unloading and stevedoring~~ services in accordance with their published tariffs or in accordance with rates specified in individual contracts with Complainants. The Port Authority provides different services and benefits which are separate and distinct from the services provided by private MTOs. The services and benefits provided by the Port Authority include the provision and maintenance of facilities, infrastructure, roadways and intermodal transportation, as well as security that allow Complainants and other carriers to move cargo containers and non-containerized cargo through the port more quickly, safely, and efficiently. Complainants concede that they benefit (although by an extent that they do not specify and attempt to obscure) from the Port Authority's provision of such facilities, infrastructure, intermodal transportation, and security projects. See supra ¶¶ 3-5, 7-8.

COMPLAINANTS' ACCEPTANCE OF PORT'S RESPONSE: Complainants accept the Port's Response except for the deleted words which are inaccurate in view of that acceptance, but irrelevant.

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Dated: August 8, 2013

Respectfully submitted,

Handwritten signature of John P. Meade in blue ink, written over a horizontal line.

John P. Meade

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CERTIFICATE OF SERVICE


I hereby certify that I caused a true and correct copy of the foregoing Statement of Facts Not in Dispute to be served this 8th day of August, 2013, via e-mail and UPS, upon the following:

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